

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

&

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

FAO.No. 206 of 2007()

AS.14/2004 of SUB COURT, NEYYATTINKARA
OS.208/1995 of PRL.M.C., NEYYATTINKARA
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APPELLANT/RESPONDENT/PLANTIFF

GRACY LEELAKUMARI, RESIDING AT AYANIVILA
VEEDU, VAZHICHAL DESOM, OTTASEKHARAMANGALAM,
NEYYATTINKARA.

BY ADV. SRI.L.MOHANAN
SMT.LIGEY ANTONY
SRI.M.V.KIRAN MOHAN

RESPONDENTS: APPELLANT/2ND DEFENDANT

SANTHA, D/O.GRACY, RESIDING AT
PANDINAMPARA, ROADARIKATHU VEEDU,
VAZHICHAL DESOM, OTTASEKHARAMANGALAM,
NEYYATTINKARA.

BY ADV. SRI.G.S.REGHUNATH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 10/10/2007, THE COURT ON 07/11/2007 DELIVERED THE
FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

F.A.O.NO.206 OF 2007

Dated this the 7th day of November, 2007

JUDGMENT

Raman, J.

This appeal is against the order of remand passed by the court below in A.S. No.14/04. Appellant is the plaintiff. The suit O.S.No.205/95 was instituted for partition and separate possession of 1/3rd share in the plaint schedule property. The property originally belonged to Kunjan Manuvel, father of the plaintiff and 2nd defendant and husband of 1st defendant. The plaintiff and defendants are thus legal heirs of the deceased Kunjan Manuvel. The parties are Christians governed by the provisions of the Indian Succession Act. Kunjan Manuvel died intestate. On his death his rights over the plaint schedule property devolved upon the plaintiff and defendants. Plaintiff and defendants are co-owners entitled to 1/3rd share each in the plaint schedule. The 1st defendant remained ex parte. The 2nd defendant filed a written statement admitting the fact that the property originally belonged to Kunjan Manuvel. It was assigned to the 2nd defendant by the 1st defendant by a settlement deed of the year 1982. The 2nd

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defendant is therefore the absolute owner of the property. According to her, the plaintiff had no manner of right over the property. Originally, the suit was decreed granting 1/3rd share to the plaintiff, against which an appeal A.S.No.190/96 was preferred before the Sub Court, Neyyattinkara. One of the contentions in the appeal was that the trial court ought to have allowed the application I.A.No.2030/1996 for amending the written statement and should have accepted the settlement deed executed by the 1st defendant in favour of the 2nd defendant. The Appellate Court found that the property belonged to Kunjan Manuvel, the father of the plaintiff and 2nd defendant. He died intestate. Hence, the plaintiff, 2nd defendant and 1st defendant, wife of Kunjan Manuvel, have equal rights over the property. If at all the settlement deed executed by the 1st defendant in favour of 2nd defendant is valid, that can only be in respect of her 1/3rd right. Therefore, the finding of the trial court that the plaintiff is entitled to 1/3rd share was confirmed and that has become final. However, the Appellate Court remanded the case holding that I.A.No.2211/96 and I.A.No.2020/96 are liable to be allowed by the trial court so as to avoid multiplicity of the proceedings and for the ends of justice. Since the trial court did not consider the validity of the settlement deed on merits, the Appellate Court held that the amendment of the written statement as

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sought for by the 2nd defendant is to be allowed and remanded the case. Thus, the appeal was partly allowed so as to reconsider the issue regarding the validity of the settlement deed. The document relied on by the 2nd defendant was received tentatively and whether it can be accepted and acted upon was left open to be decided by the trial court. Pursuant to the remand, parties appeared and the ex parte order against the 1st defendant was also set aside. The 1st defendant filed a written statement denying the execution of the settlement deed in favour of the 2nd defendant. No evidence was adduced by the 2nd defendant. Hence supplemental preliminary decree was passed on 22/11/2002 allowing 1/3rd share each to defendants 1 and 2 on payment of court fee and directing them to apply for final decree. Against the said decree the 2nd defendant again filed an appeal as A.S.No.14/04 with a petition to condone the delay. The Appellate Court dismissed the petition for condonation of delay and consequently the appeal, against which the 2nd defendant filed RSA.No.1103/2005 before this Court. As per judgment dated 1/8/2006 the said appeal was allowed and the matter was remanded to the First Appellate Court with a direction to restore the appeal to file and to dispose of the same on merits. Of course, no substantial question of law as such is seen framed. But neither party preferred any further appeal.

Based on the remand order passed by this Court, the Appellate Court reconsidered the matter on merits and allowed the appeal in turn by way of another remand to the trial court. It is against the said remand order that the present appeal is filed.

2. In this case as per the earlier remand order passed by the Lower Appellate Court direction was given to the trial court to decide whether the document relied on by the 2nd defendant can be accepted and acted upon. The trial court judgment dated 22/11/2002 shows that an additional issue was raised regarding the validity of the settlement deed No.1125/82. But the defendants 1 and 2 had not adduced any evidence. So the trial court held that the validity of the settlement deed is not established. According to the Lower Appellate Court, the judgment of the trial court thus is not made in accordance with the earlier remand order, as according to it the remand order was to dispose of the case on merits. Further, the Lower Appellate Court also placed reliance on the judgment of this Court in R.S.A. No.1103/05 and its direction to the Lower Appellate Court to restore the file and dispose of the matter after giving an opportunity to all the parties to put forward their contentions. It also took notice the fact that though the appeal preferred by the 2nd defendant, the 1st defendant was no more alive and no steps were taken to get the legal representatives

recorded. Further, the 3rd additional defendant before the court below was also not made a party in the appeal. According to the Appellate Court, this Court directed that all the parties should be given an opportunity to put forward their respective contentions and even though the 2nd defendant (appellant before the Lower Appellate Court) did not care to implead the additional 3rd defendant in the appeal, since he was already a party before the court below and to meet the ends of justice, it is proper to remand the case to the court below. This approach of the court below is clearly wrong. The earlier appeal to this Court as R.S.A.No.1103/05 was against the order of dismissal of the first appeal consequent on the dismissal of the delay condonation petition. Therefore, the only question that arose for consideration before this Court was the legality or otherwise of the order passed by the Lower Appellate Court in dismissing the delay petition. Though the Lower Appellate Court was exercising its discretion in the matter, this Court thought that the petition for condonation of delay should have been allowed, so that the appeal could be disposed of on merits. It could not have and did not proceed to enter any finding on the merits of the appeal pending before the Lower Appellate Court. The observation of this Court in the judgment in R.S.A is only regarding the manner on which the delay condonation application

should be dealt with. Paragraph 4 of the judgment of this Court deals with the question. It held that the delay occurred was 220 days and the reason put forth was that the deponent was suffering from rheumatism. Though no medical evidence was produced the conduct, the conduct of the party did not show that there was any gross negligent. It also held that the length of delay is not material and it is the quality of the reason that is to be looked into. Therefore, this Court was inclined to grant an opportunity to the appellant to contest the case on merits. Thus the scope of the appeal being limited to the consideration of the question regarding the validity of the order passed in the delay condonation application and this Court in paragraph 4 was only dealing with that question, there is no reason to think that the observation of this Court in any way related to the merits of the appeal pending before the Lower Appellate Court, as otherwise this Court would not have remanded the case to the Lower Appellate Court for fresh consideration on merits. But now the Lower Appellate Court did not consider the matter on merits. It noticed the fact that the 3rd additional defendant was not impleaded in the appeal. Likewise, the legal heirs of the 1st defendant was not brought on record. Apart from these two defects whether the trial court pursuant to the earlier remand order was right in decreeing the suit without going to the validity

of the settlement deed and whether for deciding such validity of the settlement deed any further evidence was required and if there was any failure on the part of the parties to adduce any such evidence or was it a case of denial of an opportunity to any party to adduce evidence that such evidence was not adduced or was it a case where in spite of such opportunities no evidence was adduced and whether such additional evidence is required in the matter are matters on which no finding was rendered and we feel that they are matters which ought to have been considered by the Lower Appellate Court. True that as regards the defects pointed out by the Lower Appellate Court, an opportunity could have been given to the 2nd defendant (appellant before the Lower Appellate Court) so as to cure the defects and to bring all the parties on record as dismissal of an appeal for non-jointer of necessary parties without such notice may not be justifiable. In this connection it may also be noticed that after the death of the 1st defendant, the 3rd additional defendant had raised a claim based on a Will said to have been executed by the 1st defendant and the trial court had accepted the Will as valid, against which it is submitted that an appeal is already pending before the Lower Appellate Court. If so, instead of remanding the matter to the trial court, both the appeals are required to be considered together to give a quietus to the dispute between

the parties.

3. The question of law that arises of consideration is whether in the facts and circumstances of the case, the Appellate Court was right in law in remanding the case to the trial court and whether the power of remand could be exercised in a case where the Appellate Court itself can decide the issue considering the evidence on record.

4. The discretionary jurisdiction vested in the Appellate Court to remand the matter to the trial court cannot be exercised, in cases where the Appellate Court can decide the issue considering the evidence on record. In this case in spite of the defects pointed out by the Appellate Court and without curing those defects, the matter was remanded holding that the trial court did not consider the matter on merits as directed in the earlier remand order; but did not find whether further evidence is required to be adduced by the parties, who seek the relief on the settlement deed if not the settlement deed could be received and a decision could be rendered thereon. Earlier the trial court decreed the suit when an attempt was made by the 2nd defendant to produce the settlement deed on the fag end of the case and did not receive the same in the first round, the Appellate Court tentatively accepted the settlement deed and directed the trial court to consider the matter. But nobody has a case that any further evidence was

adduced in the matter. There was no finding by the First Appellate Court in the impugned judgment either way. Whether a fresh opportunity should be given to the 2nd defendant to adduce such additional evidence and whether such evidence is required, if not whether the matter could be decided straight way on merits are thus arise for consideration. Without finding on these points, the remand order passed by the Lower Appellate Court cannot be held as a proper exercise of the power of remand.

5. In the result, we allow this appeal and remand the matter to the Lower Appellate Court with the following directions:

- 1) The 2nd defendant is given three weeks' time from today for taking steps for curing the defects in the appeal as pointed out in the order impugned in this appeal.
- 2) In case the 2nd defendant or any of the parties seek for adducing any additional evidence with regard to the validity of the settlement deed, it may be allowed.
- 3) The Lower Appellate Court shall re-consider and decide the validity of the settlement deed one way or the other. Since the other appeal is pending which involves the issue regarding the validity of the Will, that appeal will be heard together so that both the validity of the settlement deed as well as the Will may be finally decided by the

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Lower Appellate Court.

- 4) The Lower Appellate Court shall expedite the disposal of the matter.

Parties to bear their respective costs.

P.R.RAMAN,
Judge.

V.K.MOHANAN,
Judge.

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